

No. 6661

In the  
United States Circuit Court  
of Appeals

For the Ninth Circuit.

TO THE OCTOBER TERM, A. D. 1892.

WALTER HINCHMAN, *Appellant*,  
*vs.*

GEO. O. KELLEY AND ANDREW  
C. SMITH, EXECUTORS OF AND  
TRUSTEES UNDER THE LAST WILL  
AND TESTAMENT OF EDWARD S.  
SMITH, DECEASED, AND MARY  
A. SMITH AND THE NORTH  
OLYMPIA LAND COMPANY,  
*Appellees.*

IN EQUITY.

Appellant's Brief.

W. H. DOOLITTLE,  
CHARLES S. FOGG,

*Solicitors for Appellant.*

JOHN C. STALLCUP,  
EBER T. DUNNING,  
PARSONS & CORELL,  
*Solicitors for Defendants.*

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## STATEMENT OF THE CASE.

This is a suit in equity to compel the *specific performance* of a written agreement to convey an undivided (though expressed to be divided) one-fifth of certain then and now *vacant and unoccupied land* in the State of Washington.

The action is founded primarily upon the following endorsements and

### AGREEMENT.

*ARTICLES OF AGREEMENT* made this first day of Feb., One Thousand Eight Hundred and Seventy-two, at Olympia, Washington Territory, between Ira B. Thomas, party of the first part, and Edward S. Smith, party of the second part.

*Witnesseth*, That the said party of the first part hereby covenants and agrees that if the said party of the second part shall first the make payments and perform the covenants hereinafter mentioned on his part to be made and performed the said party of the first part will on the first day of January, 1874, convey and assure unto the said party of the second part in fee simple clear of all incumbrances by a good and sufficient warranty deed a divided one fifth (1-5) interest in and to what remains unsold as hereinafter provided of the following described lots, pieces and parcels of land situated in Thurston County, Washington Territory, to-wit:

Lots one (1), six (6) and seven (7) of section seventeen (17), and lots one (1), two (2), three (3), four (4) and five (5) of section eighteen (18), and lot two (2) of section twenty (20), in township nineteen (19) north of range one (1) West; and the Southwest fourth of the Southwest fourth of section seven (7) and the West half of the Southeast fourth of section twelve (12) and the West half of the Northeast fourth of section thirteen (13) and the North fourth and the South half of the Southeast fourth

of section twenty-four (24) and the Northeast fourth of section twenty-five and the Southeast fourth of section thirty-one (31) and one hundred and seventy-five one hundredths acres of the Southern portion of the William Billings Donation Claim, being the same portion of said claim conveyed to said first party by Calvin H. Hale by deed dated October twenty-first, A. D. 1871, (excepting twenty acres (20) from the West side of said claim conditionally conveyed to the Northern Pacific Railroad Company in sections thirty-five (35) and thirty-six (36), township nineteen (19) North of Range two (2) West, also all lots in first addition to North Olympia made from two hundred acres of the Putnam Hays Donation Claim in sections one (1) and two (2) and township eighteen (18) North of range two (2) West, conveyed to first party by Wm. H. Avery and wife by deed dated October 20th, A. D. 1871, excepting lots one (1) and twelve (12) and part of lots two (2) and eleven (11) in block eighty-eight (88) and lots one (1) and twelve (12) and part of lots two (2) and eleven (11) of block eighty-nine (89) of said addition.

Also a divided one-fifth (1-5) interest in and to three hundred and sixty (360) acres of land now conditionally conveyed to the Northern Pacific Railroad Company or any and all lands hereinafter received from it in exchange for the same.

And the said party of the second part covenants and agrees to pay to said party of the first part the sum of Thirty-six Hundred Dollars (\$3,600) in United States gold coin in the following manner: Five Hundred Dollars (\$500) cash in hand, the receipt of which is hereby acknowledged; Three Thousand One Hundred Dollars (\$3,100) to be paid on or before the first day of July, 1872, with interest from date at the rate of one and one-half per centum per month till paid, and to pay one-fifth (1-5) of all taxes and assessments that may be legally laid or imposed on said lands subsequent to the date hereof, and in case said second party fails to pay the said sum of Thirty-one Hundred Dollars with interest as aforesaid on or before the first day of July, 1872, then this contract shall be, at the option of said first party, forfeited and determined and the said second party shall forfeit all payments made by him in this contract and such payments shall be retained by said first party in full satisfaction and in liquidation

of all damages to him sustained. And it is mutually agreed by and between the parties herunto that said first party shall be at liberty until the first day of Jany., A. D. 1874, to make sales, exchanges and conveyances of the lands herein described in such quantities, to such persons, on such terms and for such prices as to him may seem proper and convenient, and he shall from time to time account to said second party for one-fifth (1-5) of the net proceeds arising from the sale of said land or any portion thereof, said first party deducting and retaining from the gross amount realized from the sale as aforesaid all reasonable expenses actually incurred, but nothing for commissions. And it is further agreed by and between the parties hereto that at any time after full payment has been made as aforesaid either party may require a division of their respective interests in such lands as are laid out into town lots or in such as said first party may hereafter lay out into town lots, and in the event of failing to agree upon a division each party shall choose an arbitrator, and the two arbitrators thus chosen shall choose a third arbitrator, and the three arbitrators thus chosen shall proceed to make a division, which shall be final and binding upon the parties hereto.

And it is further agreed by and between the parties hereto that any and all lands remaining unsold after payment as aforesaid shall, at the option of either party hereto, be divided and conveyed in such manner as herein provided for dividing town lots.

It is further mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties hereto.

*In testimony whereof,* The parties hereto have each subscribed their names and seals this 29th day of June, A. D. 1872.

In presence of

(Signed)

CLARK T. MORRIS,  
 GEO. T. BYNNER,  
 .....  
 E. L. SMITH.

(Signed)

I. B. THOMAS, [SEAL]  
 EDWARD S. SMITH, [SEAL]  
 SARAH L. THOMAS, [SEAL]  
 By WM. AVERY, her Atty.

ACKNOWLEDGMENT.

TERRITORY OF WASHINGTON, )  
County of Cowlitz. )

This certifies that on this twenty-ninth day of June, A. D. One Thousand Eight Hundred and Seventy-two, before me personally appeared the above named I. B. Thomas and Edward S. Smith, known to me to be the persons described in and who executed the foregoing instrument, and acknowledged the same to be their free will and act.

*Witness whereof*, I have hereunto set my hand and affixed my Notarial seal the day and year in this certificate first above written.

[SEAL] CLARK T. MORRIS,  
Notary Public.

ACKNOWLEDGMENT.

TERRITORY OF WASHINGTON, ) ss  
County of Thurston. )

On this fourth day of July, A. D. One Thousand Eight Hundred and Seventy-two, before me, a Notary Public duly commissioned and sworn in and for said Territory, personally appeared the within named Wm. H. Avery, Atty. in fact, etc., whose name is subscribed in the foregoing instrument, personally known to me to be the individual described in and who executed the within instrument as Atty., and acknowledged that he executed the same as Attorney in fact of Sarah L. Thomas freely and voluntarily for the uses and purposes therein mentioned.

*Witness whereof*, I have hereunto set my hand and affixed my Notarial seal the day and year in this certificate first above written.

[SEAL] E. S. SMITH,  
Notary Public.

“Recorded in the Auditor’s office of Thurston County, W. T., November 30th, 1872, at the request of E. S. Smith, on pages 42, 43 and 44 of Book 1 of Miscellaneous Records.

(Signed) A. A. PHILLIPS,  
Auditor Thurston Co., W. T.”

ENDORSEMENT.

“Agreement between Ira B. Thomas and Edward S. Smith.”



estate, executors of his last will and testament; that the said trustees and executors duly qualified as such and took upon themselves the duties of those offices, and as such are now acting.

That subsequent to the death of the said Smith, the said Lake Superior and Puget Sound Company, upon a good and sufficient consideration, sold and conveyed all its equitable right, title and interest in and to said premises as such *cestuis que trust* and beneficial owner of said premises, to the Whidby Land and Development Company.

That subsequently that Company sold and conveyed all its right, title and interest in and to said premises to Walter Hinchman, complainant herein.

That the holder of said agreement and grantee and owner of all the beneficial interest of the said Lake Superior and Puget Sound Company in and to said premises, prior to the commencement of this suit, requested the said legal representatives of the said Smith to assign to him the said agreement and all the right, title, interest and claim of the said Smith therein at the time of his death, which request the said representatives and Defendants herein, Sarah A. Smith, George O. Kelley and Andrew C. Smith denied and still deny.

That the said Defendant, the North Olympia Land Company, refuses to convey to complainant by proper deed of conveyance the legal title to the said one-fifth interest in said premises which, through said *mesne* conveyance it has derived from the said Ira B. Thomas as aforesaid.

And as it is further admitted by said demurrer that the lands in question are vacant and unoccupied, and were so at the time of the making of said agreement for the sale of said interest, and so have hitherto continued to the present day; and, as it is further admitted that each and every of the said grantors and grantees deducing the legal title to said property through said *mesne* conveyances from said Thomas, commencing with the conveyance of his son and widow to the said Philo Osgood, grantors and grantees with *actual notice* of all the rights of the said Lake Superior and Puget Sound Company under said agreement by reason of the premises. Wherefore, the complainant's contention is that as between the said Edward S. Smith and the said Lake



Superior and Puget Sound Company, the said company had the right, at any time it saw fit to do so, to have required of the said Smith an assignment of the said agreement to itself, and in the event of a deed of conveyance to him by the said Thomas of the legal title to the lands in said agreement mentioned, it would have been the right of said company to have, at any time, required of said Smith a conveyance to itself of the legal title so acquired by him. That the right to such assignment or conveyance was always conceded admitted by the said Smith up to the time of his death. That under all the facts and circumstances of the case, and the admissions of Defendants' demurrers herein, it is clear that Smith's title, interest and estate in said lands, by reason of the premises, amounted to and the same was expressly held by him in trust for his principal as the sole beneficiary and *cestuis que trust*, to be retained and held upon such trust so long as it should suit the conveniences, uses and needs of the company and no longer.

That such being the *status*, at the time of the making of said agreement, the heirs of Thomas took the legal title to said property by decent, burdened with the same trusts that by reason of the premises rested upon it at the moment of Thomas' death, and should have executed the deed of conveyance agreed for in the said agreement between Thomas and Smith; that when, in default and disregard of their duty of so doing, they conveyed the legal title to said lands to Osgood with full notice of said trust and said outstanding equitable estate in Smith and his *cestuis que trust*, he in turn received the legal title in trust subject to the same trusts and burdens and outstanding equities that it bore in the hands of Thomas' heirs; and in like manner each successive grantee, with full knowledge of all the facts and circumstances attending the sale to Smith, as the demurrer admits they had, took the legal title so conveyed to him as trustee of the equitable owner and *cestuis que trust*, the Lake Superior and Puget Sound Company, to the extent of its interest and estate therein.

That the same thing is true of the legal representatives of Edward S. Smith. They hold precisely the same relative position towards the *cestue que trust* for whom Smith took the equitable estate, and would have taken the legal estate, as do the persons and corporations deriving their legal estate from Thomas.

The said several successive trustees being each affected by the the same trusts and duty towards the complainant, the assignee and *mesne* grantee of the equitable estate of the said *cestue que trust*, that their remote grantors and testator, Thomas and Smith, would have been had they now been living.

And as the estate or interest, which the agreement and payment of the purchase money created in Smith, was but a *naked trust*, created by the express agency an authority to so purchase and hold said property, upon said trust, subject to the order and disposition of said *cestuis que trust*, the Lake Superior and Puget Sound Co., at any time it should see fit to direct a conveyance, near or remote, so then these several and successive grantees *with notice of the trust*, took and held, and the defendant company, the last of said grantees and consequent trustees, has and holds said legal estate upon the same terms as each of their predecessors have done, in trust for said complainant, and it is bound to convey said legal estate so held by it to the same extent and in like manner and in execution of the same trust that Thomas would be compelled to execute were he now living.

The trustee's possession being deemed the possession of the beneficiary, and no hostile possession having intervened, and no adverse rights having been acquired, or innocent parties involved, there is no reason or equitable rule for denial of the relief that Complainant seeks by his bill.

The demurrers should have been overruled, and it was error not to have done so.

The demurrers in this case present the following questions for the consideration of the Court:

1st.—Do the facts, set out in the complaint, entitle Complainant to equitable relief either under his special or general prayer for relief?

2d.—Is the Complainant's cause of action barred by a six years statute of limitation?

3d.—Had the Lake Superior and Puget Sound Company any rights under the agreement and the circumstances in connection therewith, set out in the complaint, which it could transfer by deed or assignment?

4th.—Is Complainant's claim, as disclosed in his complaint, barred by laches.

## LAW POINTS.

### I.

The facts set out in the complaint are sufficient to entitle the Complainant to a decree under the prayer for specific or for general relief.

“Complaint shall be *liberally construed* with a view to *substantial justice* between the parties.”

Code, §94.

“If complaint is not sufficiently definite a *motion* and *not* a demurrer is the proper remedy.”

Code, §95

Ultimate facts, only, are necessary to be pleaded.

Osborne vs. Clark, 60 Cal., 622.

A fact necessarily understood or implied need not be alleged.

Patridge vs. Badger, 25 Barb., 170.

Malcom vs. O'Reilley, 89 N. Y., 156.

Facts which are judicially noticed are to be regarded as matters of law, and should therefore not be alleged.

Cook vs. Tallman, 40 Iowa, 133.

The pleader may state his case in his own way.

Lane vs. Ewing, 77 Am. Dec., 632.

Complaint is sufficient if enough be alleged to indicate with distinctness the subject matter in dispute.

Tay'or vs. Benham, 5 Howard, 277.

Demurrer to bill of complaint for execution of trust not sustained if the facts set out are sufficient to enable the Court to act intelligently.

Cavender vs. Cavender, 114 U. S., 464.

No defective or insufficient averment has been *pointed out* by demurrer; and no averment is alleged to have been omitted

which ought to be found in the complaint. So, if the Court can perceive *any ground* for relief, looking at the whole bill, it will make such order of relief as is consistent with entire bill, *whether it be specially prayed for or not.*

1 Daniels' Ch. Pr., 381-382, *et notes.*

Storry's Eq. Pr. (9th Ed.) §§40-431, *et notes; Ibid* 381, notes 3 and 5—specific performance granted.

## II.

There are *no state statutes* that necessarily bar or effect *equitable actions of this character*, either in the State or Federal Courts.

And where an *agent or employe* is expressly directed by the party furnishing the purchase-money to purchase certain land in his own name for account of such principal, and does so, he will take a *dry, naked, legal title* in said lands for the use of his principal, and his subsequent *admission and acknowledgment* that he so holds such title will be conclusive of the fact that he holds such *legal title upon an express trust* for his *cestuis que trust*, in whom, at the same time, vests an equitable title and estate in said premises.

Such trusts are *continuing trusts*, and *may run indefinitely*, during the pleasure or occasion of the parties.

And no *laches* or lapse of time, as between the trustee and *cestuis que trust*, will bar the enforcement by a court of equity of a *specific performance* of such a trust. And to that end are all the authorities. See

Angell on Limitations., §472.

Story's Eq. Jur. §15200.

Springer vs. Springer, 114 Ill., 550.

Reynolds vs. Sumner, 126 Ill., 70-71-72, and cases there cited.

Cunningham vs. McKindley, 22 Ind., 149.

Oliver vs. Piatt, 3 How., 333.

Dow vs. Jewell, 18 N. H., 340.

Butler vs. Lawson, 72 Mo., 227.

Harder vs. Harder, 2 Sandf. Ch., 17.

Wood on Limitations, 413, 439,

Kane vs. Bloodgood, 7 John., Ch. 89.

Seymour vs. Freer, 8 Wall., 202.

Cholmondoley vs. Clinton, 2 Merv., 93.

This applies as well to the 3rd as to the special cause assigned in the North Olympia Land Company demurrer.

An express dry trust, as this is, may continue as long as is necessary.

Doggett vs. Hart, 58 Am- Dec., 464.

A trust estate that would otherwise be executed in the beneficiary, under the statute, will be kept on foot so long as may be needful for the discharge of the purposes of the trust.

Rife vs. Geyer, 98 Am. Dec., 351.

Kay vs. Scates, 78 Am. Dec, 399.

The legal estate will continue in the trustee so long as need be, and it will then vest in the beneficiary.

4. Kent's Com. 311, *et notes*.

At common law the trust estate passed to the heirs, or to the executors, in case of a will.

4 Kent's Com., 311.

The duration and quantity of a naked trust estate is commensurate with the particular object and purpose to be accomplished.

5 How., 268-9-70.

2 Bouvier's Law Dic., 616, §5.

### III.

*Prima facie*, all contracts of a corporation are valid and within the scope of their authority.

Pollock on Cont., 105.

Corporations may take and hold land.

I Wash. on R. Prop., 75, 76.

Hill on Tr., 73.

Alienation of property *ultra vires* passes title.

Pollock on Cont., 97. Note and case.

Corporation need not exist in the state where contract is made.

1 Patterson Corp., 363.

Not necessary to allege power of corporation to contract; it is presumed till contrary is specifically shown by way of defense.

1 Pollock on Cont., 363, note 5.

Alien corporations have power to sue in United States Courts.

*Ibid*, 365.

May contract in foreign state, and, if incapacitated to take under its charter, its grant or assignment is not void, but only voidable and only sovereign may object to it, and that only on a direct proceeding for that purpose.

Reynolds vs. First Natl. Bank, etc., 112 U. S., 413.

Cornell vs. Colorado Springs Co., 100 U. S. 55.

Jones vs. Hesbersham, 107 U. S., 174.

May purchase and hold land against all the world except the State, and against the State even *until office found*.

1 Wash. R. Prop., 74.

If an alien be made a cestuis que trust of land he may enjoy it as against all but the State.

1 Perry on Tr. §§ 55, 64.

#### IV.

By comity a foreign corporation may be permitted to hold land and to assign and transfer the same as a natural person.

Am. For. Ch., Union vs. Yount, 101 U. S. 352.

#### V.

An equitable interest or estate in land may be assigned by the cestuis qui trust, the Lake Superior and Puget Sound Company in this case.

1 Perry on Trusts, §§ 102, 227.



As the trustee may deal with the *legal estate* that is in him, so may the cestuis que trust deal with the *equitable estate* in him. He is the substantial and beneficial owner thereof, and as such he may sell and dispose of it; and any legal conveyance of it will have *in equity* the same operation and effect upon the equitable estate that a similar conveyance of the legal estate would have at law upon the legal estate.

1 Perry on Tr., §321, note 2, and cases there cited.

It is extremely clear that an *equitable interest* under a contract to purchase land may be the subject of a *valid sale or assignment*.

2 Story's Eq. Jur., §1050.

And a cestuis que trust may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee.

2 Story's Eq. Jur., 272, note 1.

*Ibid* §1051.

1 Perry on Tr., §68, *et notes*.

4 Kent, 262-3,

where it is said that all contingent and executory interests are assignable in equity, etc., and that they descend to heirs, executors, etc.

*Ibid* 262, 446, note.

2 White and T. L. Cases, 1636-7.

Buck vs. Swazey, 56 Am. Dec., 681.

3 Pomeroy's Eq. Jur., sec. 1270, note 2 and cases.

2 Pom. Eq. Jur., 989, 900, note and cases.

Dean on Prin. of Conv., 201-2.

1 Bouvier's L. Dic., "Assignment," secs. 2 and 12 and cases.

A trust estate descends like a legal estate.

Lewis vs. Hawkins, 23 Wall., 119.



In consideration of a court of equity the cestuis que trust is actually seized of the freehold.

Croxall vs. Sherrered, 5 Wall., 268.

A trust estate will pass to the assignee of an executor subject to the trust.

4 Kent's Com., 312; note.

#### VI.

In case of the assignment of a contract for the sale and conveyance of realty, the power of enforcement of its provisions and terms in equity passes to the assignee.

D'Wolff vs. Pratt, 42 Ill., 198.

Warren vs. Richmond, 53 Ill., 52.

Caudrey vs. West, 11 Ill., 146.

Corbus vs. Teed, 69 Ill., 205.

#### VII.

The purchaser of a trust estate, with notice of the trust, becomes a trustee. A party taking title to land, with notice of an outstanding equity, takes subject to that equity.

2 Wash. on R. Prop., 515, 520.

2 White and T. L. Cases, 1154-5

Wilson vs. Mason, 1 Cranch, 45.

Webster vs. French, 11 Ill., 254.

Philips vs. South Park Com'rs. 119 Ill., 626.

Walden vs. Skinner, 101 U. S., 577.

Lagow vs. Badollet, 12 Am. Dec., 258.

Heth vs. Richmond, etc., R. R. Co., 50 Am. Dec., 88.

Trust will not be suffered to fail for want of a trustee.

Hill on Tr., 260-261.

Trust will be enforced against anyone who comes into trust property with notice.

Rife vs. Geyer, 98 Am. Dec., 351, note.

Lamborn vs. Watson, 14 Am. Dec., 275; note.

Gallon vs. McCaslin, 12 Am. Dec., 208.

2 Perry on Trusts, sec. 828, note.

*Ibid* 835, note.

4 Kent's Com., 307-8, *et notes*.

*Ibid* 311, 312, note.

Constructive trusts arise where legal title is wrongfully obtained, contrary to the will of the lawful trustee.

1 Perry on Trusts, sec. 166.

3 Pom. on Eq. Jur., 1044.

### VIII.

Possession of trustee is possession of the cestuis que trust.

Adams Equity, 62, note 2.

Hounden vs. Ld. Annesley, 2 Sch. & Lef. 633.

Boon vs. Chilles, 10 Peters, 246-7.

Miller vs. Bingham, 36 Am. Dec., 58.

Trustee in possession will not be presumed to hold adversely to his cestuis que trust.

2 Perry on Tr., 497-8.

Kane vs. Bloodgood, 11 Am. Dec. 430-1-2.

Possession of trustee is possession of cestuis que trust, and no time will bar the latter.

Wood on Lim., 112, 418, 433.

When possession is taken by trustee as agent, the possession is that of the cestuis que trust or principal, and cannot be adverse until the trust is openly disavowed or denied, and that fact unmistakably brought home to the cestuis que trust.

Reynolds vs. Sumner, 126 Ill., 58, 64, and cases there cited.

IX.

EXPRESS TRUSTS—WHAT ARE?

An express private passive trust is one where land is conveyed to A to be by him held in trust for B, without power to exercise any acts of ownership, and where the *naked legal title* is vested in A, while the equitable and beneficial ownership and estate is vested in B.

1 Pom. Eq. Juris., sec. 153.

2 Washburn on R. Prop., 519, 465, 470.

Rife vs. Geyer, 98 Am. Dec., 351; note.

4 Kent's Com., 305.

• 2 Perry on Tr., sec. 520.

X.

TRUSTS—EXECUTED AND EXECUTORY.

A trust is executory when the cestui que trust is not yet clothed with the equitable title.

3 Wash. on R. Prop., 486, 718.

Adams Eq. [80].

Padfield vs. Padfield, 72 Ill., 322.

Nicoll vs. Ogden, 81 Am. Dec., 34.

Executory trusts or claims are more readily affected by *laches* than executed trusts, which are not barred by lapse of time, unless waived.

2 Story's Eq. Jur., 779, 780.

An executory trust is where something remains to be done to settle the trust in the trustee in order to carry it out.

Hill on Tr., 473.

Consideration is not material where the trust is executed. When the relation of trustee and cestui que trust has once been established the Court will compel its execution without regard to the consideration.

Anderson vs. Green, 23 Am. Dec. 424, 427-8, and note.

An executed trust cannot be revoked.

1 Perry on Tr., §§ 75, 104.

When settlor of trust has nothing further to do the trust is an *executed* one, and will be carried into effect by the Court.

1 Perry on Tr., 87, *et notes*.

*Ibid* 100.

4 Kent's Com., 305, note.

2 Pom. Eq. Jur., §§ 1000, 1001,

where it is said that a trust is termed *executed* when nothing remains to be done to vest the legal title in the trustee—as a conveyance to A in trust for B; note.

2 Bouvier's Law Dic., 615, "Trust."

## XI.

A trustee is estopped to set up a claim adverse to his cestui que trust.

2 Perry on Tr., 493, notes 2 and 3.

This rule applies to trustees whether regularly appointed or not.

*Ibid*, 493-4.

In its first aspect, estoppel flows from a contract, which has been executed on the part of him who claims the estoppel.

Bigelow on Estop., 345, 424; note.

4 Kent's Com., 262-3.

Where party has received the payment for his land, he will not be heard to deny the right of the corporation to take title.

Pollock, 97; notes, and numerous cases there cited.

*Ibid*, 581.

3 Pom. Eq. Juris., 1297; note 2.

The theory of a specific performance is that it would be a fraud upon the party claiming it not to compel it. *Ibid*.

After receiving the price of the land, the seller cannot then question the corporation's right to purchase or take title.

Meyer vs. Craft, 13 Wall., 291.

Equity will regard the legal title, stipulated for in the agreement, *as having been conveyed* by Thomas in his life time to Smith *in order to simplify and work out the particular equity in the case.*

2 Spence's Epuit. Jur., 253.

Adams' Eq., 135.

1 Pom. Eq. Jur., § 364, and notes 1, 2 and 3, and cases cited.

1 Story's Eq. Juris., §64 g, and note and cases cited.

Equity will look upon that as done which ought to have been done.

Snell's Equity, 37 (10)

Mr. Justice Story says: "The true meaning of this maxim is that *equity* will treat the *subject-matter of a contract*, as to collateral consequences and incidents, *in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been done under the agreement.*"

## XII.

Under the statutes of the State of Washington an action to quiet title may be maintained by persons having merely an equitable title.

Jackson vs. Tatebo, 3 Wash., 456.

## XIII.

In the case of Balch vs. Smith, 30 Pac. R., 649, the Supreme Court of this State say: "In our opinion our statute of limitations is like that of most of the other states, one of adverse possession, and under it the rightful owner of real estate is seized of the same, whether or not he is in actual possession thereof, unless the same is in the actual adverse possession of some other person. This being so, it follows that when ownership and seizin is once shown it will be presumed to have continued until such presumption is overcome by allegation and proof of adverse possession in some one else."

Respectfully submitted,

W. H. DOOLITTLE,  
CHARLES S. FOGG.